

alternative, claimant's attorney argued that claimant had ceased participating in the horseplay at the time of the accident and that he was assaulted by a co-worker.

The only issue on this appeal is whether claimant's August 2005 accident arose out of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes the preliminary hearing Order should be reversed regarding the August 2005 accident. That part of the Order pertaining to Docket No. 1,024,988 granting claimant medical treatment for the April 2005 accident and resulting left knee injury is not at issue and is therefore affirmed.

Respondent employed claimant as a machine operator. On August 4, 2005, claimant and several co-workers were laying plastic pipe, along Highway 400. Believing a certain co-worker had earlier poured water on the seat of the dozer he was operating that day, later that day claimant found an opportunity to retaliate and he consequently tossed some water on that individual. As claimant walked back to his dozer, the co-worker grabbed him in a bear hug before they both tripped on either extension cords or plastic pipe, which caused the co-worker to land on top of claimant. Claimant described the accident, as follows:

I was pulling poly pipe while they were welding it and they just finished welding a joint and I got off my dozer with my water bottle to go get some more water and they were all standing around talking and everything and I was talking to Scott and everybody was just sitting around talking and he was joking with me and I threw water on him and usually everybody was throwing water that day, actually, and I turned around to walk back to my dozer and in between the poly pipe and the work truck and there was an extension cords [sic] running to the work truck which runs the machines that weld the pipe together. I was walking back and Scott come up behind me and I thought he was trying to catch me when I tripped over the extension cords and he kind of grabbed me and I went over the pipe with him on top of me.¹

Claimant alleges he injured his low back and ribs in the accident.

The issue the parties presented to the Judge was whether claimant was participating in horseplay at the time of the accident. The Judge granted claimant's request

¹ P.H. Trans. at 82.

for medical benefits after finding claimant's injury was caused by a co-employee's horseplay. The Judge held, in part:

The question for the Court is whether or not Claimant is a non-participating employee as defined by the Kansas Supreme Court in *Coleman v. Armour Swift-Eckrich*. The Court finds that the Claimant was exposed to danger in the workplace due to his co-employee's horseplay through no choice of his own. The initial prank initiated a series of events which ultimately caused Claimant's injury. Respondent is to provide a list of three physicians from which Claimant is to choose an Authorized Treating Physician.²

Claimant and two co-workers testified at the preliminary hearing. Excepting whether claimant tripped over an extension cord or pipe, the descriptions of the incident provided by those three are quite similar. This Board Member finds claimant's accident occurred during horseplay and that claimant was a participant as he tossed water on the co-worker who then retaliated by grabbing claimant in a bear hug. Accordingly, the Judge's finding that claimant was not a participant in the horseplay is reversed. And consequently, that part of the preliminary hearing Order that was premised upon that finding must be reversed.

In summary, that part of the preliminary hearing Order that awards claimant medical benefits for his April 2005 accident and resulting left knee injury is affirmed. But that part of the Order that awards claimant medical benefits for the August 2005 accident and alleged low back and rib injuries is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member modifies the September 29, 2006, Order and affirms the grant of medical benefits for claimant's left knee in Docket No. 1,024,988 but reverses the grant of medical benefits for claimant's low back and ribs in Docket No. 1,024,989.

IT IS SO ORDERED.

² ALJ Order (Sept. 29, 2006) at 1, 2.

³ K.S.A. 44-534a.

Dated this ____ day of January, 2007.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge